No. 12,119

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JACK ANDRADE, Claimant of One 1947 Cadillac Automobile, Motor No. 8431298, Serial No. 8431298, its tools and appurtenances,
Appellee.

BRIEF FOR APPELLEE.

FRED A. WATKINS,
85 Post Street, San Francisco 4, California,
Attorney for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

The appellee, Jack Andrade, a used car dealer at 810 Van Ness Avenue, San Francisco, California, purchased in the course of his business a 1947 Cadillac sedanette automobile for $5,100, and in the regular course of business sold it to one Everett Brown for $5,300 (Tr. 112, 113). Mrs. Edwina DeLong, office manager for appellee, procured a purchaser's credit statement in writing from Brown, ascertained he was a foreman of longshoremen, a member of the C.I.O. Longshoremen's Union, and that he owned real prop-

erty at 1430 O'Farrell Street, San Francisco, California, the income from which was $150 a month. A cash down payment of $2,307 was made by Everett Brown and a conditional sale contract executed (Tr. 108, 109). Appellee assigned the contract to Pacific Finance Corporation, and when Everett Brown defaulted in payments, the appellee, by virtue of his guarantee of payment contract, took a re-assignment of the conditional sale contract from the finance company and reimbursed the corporation $3,123.10 (Tr. 114, 115, 116).

The contract of conditional sale expressly provides the purchaser shall not make illegal or improper use of the automobile. Time is declared to be of the essence, and a default on the part of the purchaser as to any of the terms entitles the seller to take immediate possession of the property without demand (Tr. 15).

Testimony of the Federal Narcotics Agents established that the automobile had been used by one Kado Barrow to transport narcotics. Contact was established by an informer telephoning the residence of Everett Brown at 1430 O'Farrell Street, San Francisco, California (Tr. 64). On each occasion, Kado Barrow answered (Tr. 64, 67, 69, 72). Agent Thomas McGuire stated both Barrow and Brown lived at the same address, 1430 O'Farrell Street, but offered no evidence to prove the assertion (Tr. 61). There is no testimony in the record that Everett Brown ever answered the telephone when the informer called or had any part in the transportation of narcotics in this

Cadillac automobile. To the contrary, Everett Brown was not in the Cadillac on any of the occasions, and the agents so testified. And, when Kado Barrow was arrested, he was in a Yellow taxicab with narcotics on his person (Tr. 95). There is also a total lack of evidence on the point as to how Kado Barrow happened to be in possession of the automobile and a total lack of evidence connecting Brown in any way with Barrow in transporting narcotics in the automobile. Nor was any evidence adduced that Brown had either expressly or impliedly given permission to Barrow to use the Cadillac automobile. The conviction of Everett Brown for violation of the narcotics law was not in connection with the use of the Cadillac (Tr. 74, 77). The libel of information in the present case does not mention Kado Barrow, but states "that the said contraband articles had been possessed and concealed and were then and there possessed and concealed in or upon said automobile and in or upon the person of Everett Brown while in or upon said automobile." (Tr. 3).

FINDINGS.

The trial Court found that Everett Brown had not expressly or impliedly authorized Kado Barrow to have possession of the Cadillac, and that he was in illegal possession of it in the transportation of narcotics. The Court further found that Jack Andrade was a stranger to both Barrow and Brown and acted in good faith when selling the Cadillac to Brown.

ARGUMENT.

BASIC PURPOSE OF FORFEITURE STATUTE RELATES TO COLLECTION OF TAXES.

It has been held that Title 49, U.S.C.A., Section 782, providing for forfeiture of a vehicle used in connection with the conveyance of contraband articles, is constitutional as having a direct relation to the efficient collection of taxes.

U. S. v. Chiles (D.C. Ga. 1942), 43 F. Supp. 776;

U. S. v. One 1941 Chrysler Brougham Sedan (D.C. Mich. 1947), 74 F. Supp. 970.

TRIAL COURT IS SOLE JUDGE OF PROBABLE CAUSE.

Burden of proof rests upon claimant provided "That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof, etc."

Title 19, U.S.C.A., Section 1615.

Obviously, the revenue laws would be violated with impunity if the Government had to prove matters possibly known only to the alleged violator. However, there are recognized limitations, as stated in *U. S. v. The J. Duffy,* 14 F. (2d) 426, at page 429:

> "If the true construction of that statute is that in a suit to enforce a confiscation the burden of proving his innocence lies upon the owner of the property sought to be confiscated, then I would have no hesitation in declaring that statute unconstitutional. To call such a suit dominated by

such a procedural rule 'due process of law' is to delete all significance of the constitutional guaranty. In civil suits, the burden of proving his case by a 'fair preponderance of evidence' lies on the plaintiff. In criminal actions, the burden of proving the crime beyond a reasonable doubt lies on the state. Are we to understand in suits aiming at confiscation the whole theory of our judicial procedure is reversed; that wholly irrespective of whether a prima facie case has been presented or a case of probable cause, property stands confiscated to the Government unless the owner manages in some way to disprove something that has not even been charged or proven. The statute does not go to such lengths. It may well be that the burden of proof is *shifted* to the claimant when 'probable cause has been sufficiently shown' *to be judged of by the court.*

"I can conceive of no adequate showing of probable cause short of a prima facie case. Indeed the intendment of the statute, as I read it, is merely to make such a prima facie case adequate to the purpose of confiscation, unless the claimant then assumes the burden of proof."

This case well states the distinction the Government attorneys frequently disregard. They proceed recklessly, anticipating the might of the Government will terrorize opposition and so confiscate property to the injury of innocent people. The present case is an example. The libel named Everett Brown, the purchaser of the car, as the one who transported narcotics in it. At the trial, Everett Brown was not even mentioned in connection with the car, except as the owner,

and one Kado Barrow was shown to be the culprit by the Government's witnesses. This fact, when emphasized, was waived aside by the United States attorney as of no importance, who expected the Court to draw an inference of guilt with no evidence to support it. We admit Everett Brown, who purchased the car, resided at 1430 O'Farrell Street. We admit he was convicted of trafficking in narcotics. We admit that Kado Barrow used the car to transport narcotics, but that is the extent of the evidence. Nothing in the record establishes even indirectly that Kado Barrow had the permission of Everett Brown to use the car. The Court would have to infer permission. The opposite inference, and the one which possibly influenced the Court, was that Kado Barrow did not have permission of Brown to use his car and expose it to a possible seizure and forfeiture. Brown himself did not use the car for such purpose, although the Government proved he was a dealer in narcotics.

Evidence is entirely wanting that there was any connection between Brown and Barrow. They were not seen together, nor did either one make a statement the car was used with Brown's permission. It was within the Government's power to prove the point by Brown or Barrow, but not even an offer of evidence to such effect appears in the record. We have consequently a situation where the purpose of the statute is violated. An innocent person without knowledge is demanded by the Government to establish facts the Government itself was in a better position to prove.

The burden of the cases prosecuted under this statute largely is based on the presumed better knowledge of the claimant, as exemplified in *U. S. v. Fraser* (C.C. S.C. 1890), 42 F. 140:

> "Where defendant is found in possession of smuggled goods, it is incumbent upon him to explain his possession to the satisfaction of the jury. Otherwise he will be found guilty."

Appellant says that the burden of proof shifted to the claimant and cites several cases:

The first—*U. S. v. One 1937 Hudson Terraplane Coupe,* 21 F. Supp. 600. The claimant was a conditional vendor of an automobile which was used to transport narcotics by a person who had the consent of the vendee. The trial Court was upheld in declaring the forfeiture. There was no doubt that the user of the car had the consent of the owner, but such consent was not proved in the instant case.

The next—*U. S. v. One Dodge Coupe,* 43 F. Supp. 60. In this case, the conditional vendee himself apparently was in the automobile violating the narcotics act. No other evidence was offered by the conditional vendor claimant, and the car was forfeited.

The next case cited by appellant is *General Motors Acceptance Corp. v. U. S.,* 63 F. (2d) 209. Here, again, the conditional vendee was proved violating the law, and the conditional vendor was denied the right to recover the car. The distinction is clear in all these cases: either the purchaser of the car himself

was operating it in violation of the law or someone who had his consent was doing so. Again, we emphasize it was not shown that Kado Barrow, convicted of illegal use of this Cadillac, had the consent of the purchaser, Brown, to use the car. The same holds true with respect to the other cases cited by appellant.

A case directly in point is *U. S. v. One Reo Speed Wagon,* 5 F. (2d) 372. Claimant, a fisherman, had allowed his son to use his automobile. The son lent the truck to one Russo, who used it in violation of the tariff and alcoholic laws. Claimant had no knowledge of Russo or his purpose. The Court, in denying the forfeiture, said that the Government had not shown probable cause, declaring there must be something more than slight evidence, something more than speculation or suspicion to establish probable cause.

Another case, even stronger, is *Platt v. U. S.* (C.C.A. Okla. 1947), 163 F. (2d) 165. A mother, knowing her daughter was a dope addict, permitted the daughter to use her automobile to go to a drugstore, but not knowing that she intended to obtain morphine. The Court held that the automobile was not subject to forfeiture on the ground that it was used to "facilitate" the purchase of the morphine, since the use of the automobile merely enabled the daughter to get to the drugstore, but did not facilitate the purchase of the morphine. This indicates the tendency not to extend this highly penal statute unnecessarily.

Another case is *U. S. v. One 1938 Chevrolet, etc.* (S. Car. 1948), 78 F. Supp. 676. Mrs. Autry, owner of an automobile, had lent it to her husband who, while intoxicated, permitted a third person to use the car, who, in doing so, violated the narcotics law. The Court held Mrs. Autry could recover the automobile, that no consent could be implied on the part of her husband to the use of the automobile while he was in a state of intoxication.

In *People v. One 1937 Plymouth 6, etc.,* 37 C. A. (2d) 65, which involved a proceeding under the California State Narcotics Act, appears the following language at pages 70, 71:

> "In *United States v. One Buick Roadster,* 280 Fed. 517, the court said at page 519: 'The fiction that the thing is guilty is but a convenience of procedure, to visit justice by way of forfeiture upon those, perhaps unknown, whose conduct contributed to the thing's lawful use. Otherwise, outlawry, the superstitions of deodand and trial and punishment of inanimate things, have disappeared, and it is doubtful if any modern law purports to confiscate lawful property because unlawfully used by trespasser or thief. If section 3450 does, how can it be maintained in view of the due process clause of the Constitution? What is it but a mere arbitrary act of government in violation of that fundamental right to own property, for the security of which society is organized and government maintained? What immemorial practice of government justifies this legislative power? Wherein are public welfare, and rights common to all, served by this invasion

of individual right of property? What principle of justice permits it? To support the proponent no answer comes to mind, and until successfully answered it must be held that the literal import aforesaid of section 3450 contravenes the due process clause, to avoid which, its general terms permitting, again it will be presumed that Congress intended exceptions of trespasser and thief.' (See, also, *United States v. One Reo Speed Wagon,* 5 Fed. (2d) 372, 373; *United States v. One Ford Coupe Automobile,* 21 Fed. (2d) 639, 640; *United States v. One Dodge Truck,* 9 Fed. Supp. 157, and cases therein cited; *State v. Goyette,* 140 Kan. 732 (37 Pac. (2d) 1001); compare *United States v. One Haynes Automobile,* 290 Fed. 399.) The line of demarcation established in these cases is whether or not the owner has consented to the use of his property. If he has not, his property is not subject to forfeiture. If he has, the property may be forfeited regardless of his lack of knowledge of or consent to the unlawful use. Such distinction appears sound in view of the decision in *Goldsmith, Jr.-Grant Co. v. United States, supra,* and the line of decisions in the federal courts has sprung directly from that case.

"We are unable to appreciate how appellant is able to draw any distinction, which he indicates should be drawn, between use by a thief, and use by a person without the consent or permission of the owner. The latter use is unlawful, constituting a trespass or conversion, and the act of driving an automobile without the owner's consent is now a crime. (Vehicle Code, sec. 503.) The dif-

ference is one only of degree and is too slight to justify any distinction.

"Appellant strongly argues that if the owner may defend against a forfeiture by proof that the vehicle was used without his consent or permission, the way is opened for collusion and perjury in an attempt to defeat forfeiture. Such a consideration is one to be met by the careful scrutiny of the trial judge, who has at the trial an opportunity to view the witnesses and weigh the credibility of the evidence offered. It is not a sufficient consideration to justify an apparent arbitrary invasion by the legislature of property rights protected by both the state and federal Constitutions."

We quote this case at length for the true distinction it makes in these forfeiture cases. And, again, we say the trial judge, in the absence of evidence that Kado Barrow had the consent of Everett Brown to use the automobile, was right in finding Barrow was illegally in possession of the car. The question was properly for the decision of the trial Court. It is well settled that the Federal Court of Review will indulge in all necessary presumptions not inconsistent with the record to uphold the proceedings and rulings in the Court below.

Loring v. Frue, 104 U. S. 223, 26 L. ed. 713;
Johnson v. American Hawaiian Steamship Co., 98 F. (2d) 847.

Furthermore, findings of fact are not to be set aside unless clearly erroneous, where the finding is of a

fact concerning which there was a conflict of testimony or of a fact deduced or inferred from uncontradicted testimony.

Federal Rules of Civil Procedure, Rule 52(a); *U. S. v. Still,* 120 F. (2d) 876.

Section 1615, Title 19, U.S.C.A., relating to burden of proof in forfeiture proceedings, after stating the burden of proof shall be upon the defendant, continues:

"* * * Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

"(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

"(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying merchandise (sic) or containers of merchandise shall be prima facie evidence of the foreign origin of such merchandise.

"(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or

communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel. (June 17, 1930, c. 497, Title IV, Sec. 615, 46 Stat. 757; Aug. 5, 1935, c. 438, Title II, Sec. 207, 49 Stat. 525.)"

It will be noted that there are three enumerated situations only where certain things shall constitute prima facie evidence. The instant case does not come within any of these rules; a further indication that the harsh rule insisted upon by appellant is inapplicable.

It is interesting to consider that Title 49, U.S.C.A., Section 784, "Application of related laws," contained on the last page of appellant's Appendix to opening brief, provides for remission or mitigation of forfeitures. The Supreme Court apparently has not passed on this section in connection with narcotics. It is submitted that the trial Court has the power of remission or mitigation of forfeitures inasmuch as Section 784 is part of the chapter on seizure and forfeiture for transporting narcotics.

In *U. S. v. One 1941 Plymouth Tudor Sedan* (C.C.A. Okla. 1946), 153 Fed. (2d) 19, Section 784 was held limited to vehicles used in transporting liquor in violation of the revenue laws only. The statute does not so limit the section. The same ruling was made in *U. S. v. 1946 Plymouth Sedan* (D.C. N.Y. 1946), 73 F. Supp. 88.

Notwithstanding these decisions to the contrary, it is submitted the power of remission is vested in the

Court where narcotics are involved as well as illicit alcohol. This is not advanced as decisive of the case, but as indicative of the latitude to be observed in protecting the rights of the innocent.

CONCLUSION.

In brief, the order denying forfeiture should be sustained because it was not proved Kado Barrow was driving with the consent of the purchaser of the Cadillac when it was found in Barrow's possession. On the contrary the finding of lack of consent and illegal possession is supported by the evidence.

Dated, San Francisco, California,
May 2, 1949.

Respectfully submitted,
FRED A. WATKINS,
Attorney for Appellee.